

ISSUED OCTOBER 19, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA

GILBERT RAMIREZ	)	AB-7433
dba Kennedy' s Market)	
56400 Monroe Street	)	File: 21-60919
Thermal, California 92274,	)	Reg: 98045131
Appellant/Licensee,)	
	)	Administrative Law Judge
v.	)	at the Dept. Hearing:
	)	John P. McCarthy
)	
DEPARTMENT OF ALCOHOLIC	)	Date and Place of the
BEVERAGE CONTROL,	)	Appeals Board Hearing:
Respondent.	)	August 3, 2000
	)	Los Angeles, CA

Gilbert Ramirez, doing business as Kennedy's Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control¹ which suspended his off-sale general license for having possessed hypodermic needles and/or syringes upon the premises, and having failed to maintain records of inventory, sales, acquisition or disposition of dangerous drugs or dangerous devices, being contrary to the universal and generic public welfare and morals provisions of the

¹ The decision of the Department, dated June 24, 1999, is set forth in the appendix. Also, because the issue involves whether appellant received notice of the hearing, we have included in the appendix the notices contained in the certified file provided by the Department.

California Constitution, article XX, §22, arising from violations of Business and Professions Code §24200, subdivision (a), in conjunction with Business and Professions Code §§ 4110, 4051, 4140, and 4081.

Appearances on appeal include appellant Gilbert Ramirez, representing himself, and the Department of Alcoholic Beverage Control, appearing through its counsel, Jonathon E. Logan.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on March 2, 1987. Thereafter, the Department instituted an accusation against appellant charging in four counts that he conducted a pharmacy without a license (count 1); possessed dangerous drugs on the premises for the purposes of manufacturing, compounding, sales or dispensing (count 2); possessed hypodermic needles and/or syringes upon the premises (count 3); and failed to maintain records of inventory, sales, acquisition or disposition of dangerous drugs or dangerous devices (count 4).

An administrative hearing was held on April 14, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Department investigator Dawn Richardson regarding certain items discovered during an inspection of appellant's premises, and Valerie Knight, an inspector for the California State Board of Pharmacy, who identified the items seized by Richardson, and their legal status. The hearing was conducted as a default hearing, in the absence of any appearance by appellant or his counsel.

Subsequent to the hearing, the Department issued its decision which sustained counts 3 and 4, as summarized above, and dismissed counts 1 and 2.

Appellant thereafter filed a timely notice of appeal, in the form of a letter

from his attorney,² in which he claims that he did not receive notice of the continued hearing, and was thereby prevented from asserting what he claims are strong defenses to the charges of the accusation.³ Appellant has not filed a brief.

The hearing in this matter, at one time set for March 19, 1999, was continued to April 14, 1999, for reasons which do not appear in the record. The issue in this appeal is whether appellant received notice of the continuance. Had he received such notice, and failed to appear, there would clearly be no merit to the claim that appellant was prevented from presenting any defenses he may have had.

At the commencement of the hearing, the Administrative Law Judge (ALJ) noted the absence of appellant or his counsel, and marked as exhibits the various notices of continued hearing dates and other jurisdictional documents. Concluding that these documents established valid service by mail of notice of the time and place of the hearing, the ALJ went forward with the hearing, and the Department presented its two witnesses and offered certain exhibits.

We have examined the exhibits, and reviewed the statutes involved (provisions of the Pharmacy Act in the Business and Professions Code), and are satisfied that, on the evidence presented at the hearing, the Department presented a prima facie case of violation, sufficient, given the default, to support the decision and order.

However, if, as appellant contends, he received no notice of the hearing

² The Board has since been advised that the attorney no longer represents appellant.

³ At the time of the investigation, appellant told the Department investigator the various items were for the personal use of his family. [RT 20-22.]

date, he was denied due process, i.e., the right to be heard, and the Department's decision is a nullity.

The accusation states appellant's address to be as follows: "Kennedy's Market, 56400 Monroe Street, Thermal, CA 92274." However, the proof of service for the accusation package,⁴ dated December 3, 1998, lists the address as follows: "Kennedy's Market, 56 400 Monroe Street, La Quinta CA 92253." We can safely assume, despite the discrepancy in the addresses, that appellant received the accusation, since he personally signed the notice of defense form on December 11, 1999. The Department is shown as having received it six days later. Appellant wrote his address beneath his signature as follows: "56-400 Monroe, La Quinta, CA 92253."

There are two notices of continued hearings in the record. The first continued the hearing from February 24, 1999, to March 19, 1999. The second notice set the new date as April 14, 1999, the day the hearing actually went forward in appellant's absence. The proof of service for each notice set forth both the address in the accusation and the address in the proof of service which accompanied the accusation package.

Nothing in the documents which were referred to by the ALJ contained any notations which might have suggested a possible delivery problem. However, the copies of the proofs of service for the original notice of hearing and the notice of the continuance bear notations indicating that both mailings to the address in Thermal, California, were returned.

⁴ The accusation package consists of a copy of the accusation, the accompanying statement of discovery, and a notice of defense form.

We would be inclined to accord little weight to appellant's claim that he did not receive notice of the continued hearing but for the fact that the Department's files reflected the use of two different but confusingly similar addresses for appellant's business. This, plus the fact that notations on some of the file documents indicate that mailings had been returned, raise sufficient questions in our mind that we think justice would better be served by our reversing the decision and remanding the case to the Department for a hearing on the merits.

ORDER

The decision of the Department is reversed and the case is remanded to the Department for such further proceedings as may be appropriate in light of the comments herein.⁵

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

⁵ This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.